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Supreme Court of the United States

OCTOBER TERM, 1974

THE NATIONAL LEAGUE OF CITIES, ET AL., *Appellants*

v.

JOHN T. DUNLOP, Secretary of Labor

THE STATE OF CALIFORNIA, *Appellant*

v.

JOHN T. DUNLOP, Secretary of Labor

On Appeals from the United States District Court for the District of Columbia

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BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

J. ALBERT WOLL
General Counsel, AFL-CIO

ROBERT C. MAYER
LAURENCE GOLD
735 Bowen Building
815 Fifteenth Street, N.W.
Washington, D.C. 20005

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This brief *amicus curiae*, in support of the position of John T. Dunlop, Secretary of Labor, is filed by the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), with the consent of the parties, as provided for in Rule 42 of the Rules of this Court.

INTEREST OF THE AFL-CIO

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) is a federation of 111 national and international labor unions that have approxi-

mately 13,500,000 members. The following AFL-CIO unions, among others, represent employees of state and local governments covered by the 1974 amendments to the Fair Labor Standards Act: Communication Workers of America (10,000 public employee members); International Union of Operating Engineers (30,000 public employee members); International Association of Fire Fighters (155,000 public employee members); Laborers International Union of North America (80,000 public employee members); International Brotherhood of Painters and Allied Trades of the United States and Canada (10,000 public employee members); United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada (25,000 public employee members); Seafarers International Union of North America (10,000 public employee members); Service Employees International Union (200,000 public employee members); American Federation of State, County and Municipal Employees (700,000 public employee members); American Federation of Teachers (425,000 public employee members); Amalgamated Transit Union (50,000 public employee members).

The AFL-CIO, has determined to participate in this case for two basic reasons. First, and most obviously, the Federation's affiliates are the freely selected representatives of scores of public employees directly affected by the 1974 amendments, the validity of which is at issue here. The AFL-CIO therefore supported the 1974 amendments in the vigorous debate that surrounded their consideration and eventual adoption by the Congress. We have concluded that we would be derelict in our duty to these members if we were to abandon the matter now that the appellants have transferred their opposition from the Legislative Branch to this forum.

Second, it is the conviction of the AFL-CIO that working men and women, whether employed by a private or public employer, and whether they have chosen to be represented in dealing with their employer or not, deserve a living wage for their labor. Yet, in 1973 approximately 409,000 State and local government employees were paid less than $1.90 an hour [1]—at a time when the poverty level income for an urban family of four was $4,540 or approximately $2.27 an hour.[2] That is a national disgrace which fully warranted the national corrective enacted by Congress.

ARGUMENT

In these cases the appellants challenge Congress' constitutional authority pursuant to the commerce power to establish a minimum wage, and a maximum limit of hours unless overtime wages are paid, for public employees (other than executives, administrators, professionals, elected officials and their personal staffs, policymaking appointees and immediate advisors) who work in enterprises in commerce.

The most casual consideration reveals three flaws in the appellants' analysis of the Commerce Clause, each of which, we believe, is fatal to their position. Since the Secretary of Labor's brief exposes these defects in the appellants' case in some detail, we merely note them here. Further, it is our view that the appellants are wrong also in the very premise from which they start—that the Constitution reserves to the States a greater authority to set the term and conditions of public employees than to legislate on that

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[1] See Background Materials on the Fair Labor Standards Act Amendments of 1973, 93d Cong., 1st Sess., p. 220; H. Rept. 93-913, 93d Cong., 2d Sess., p. 28.

[2] S. Rep. 93-690, 93d Cong., 2d Sess., p. 8.

subject with regard to employees in the private sector working within their borders. We devote the second portion of our argument to a discussion of that error showing first that no explicit provision of the Constitution supports that premise and second that the Supremacy Clause squarely refutes it. Finally, the appellants make much of the supposed hardships visited on the States by the federal requirement that firefighters be paid overtime. Since the International Association of Fire Fighters is one of the international unions that makes up the AFL-CIO we believe it appropriate to conclude by responding to those false alarms.

(a) The appellants' conception of the extent to which the States are subject to Congress' power to regulate commerce is contrary to the uniform teachings of this Court, as Mr. Justice Harlan demonstrated in the most recent case in point, *Maryland* v. *Wirtz,* 392 U.S. 183, 195-196, 196-197, 198-199:

> "It is clear that labor conditions in schools and hospitals can affect commerce. The facts stipulated in this case indicate that such institutions are major users of goods imported from other States * * *. Strikes and work stoppages involving employees of schools and hospitals, events which unfortunately are not infrequent, obviously interrupt and burden this flow of goods across state lines. It is therefore clear that a rational basis exists for congressional action prescribing minimum labor standards for schools and hospitals, as for other importing enterprises.
>
> * * *
>
> "The Federal Government, when acting within a delegated power, may override countervailing state interests whether these be described as governmental or proprietary in character. As long ago as Sanitary District v. United States, 266 US 405, the Court put to rest the contention that state concerns might constitutionally outweight the importance of an otherwise valid federal statute regulating commerce.
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> * * *
>
> "While the commerce power has limits, valid general regulations of commerce do not cease to be regulations of commerce because a State is involved. If a State is engaging in economic activities that are validly regulated by the Federal Government when engaged in by private persons, the State too may be forced to conform its activities to federal regulation. This was the unanimous decision in United States v California, 297 US 175." (Footnote omitted.)

(b) Contrary to appellants, these precedents do not sanction a federal usurpation of authority reserved to the States, they embody the only rule consistent with the original understanding of the grant to Congress of the "Power * * * to regulate Commerce * * * among the several States * * *." As Chief Justice Hughes stated in *Labor Board* v. *Jones & Laughlin Steel Corp.,* 301 U.S. 1, 36-37:

> "The Congressional authority to protect interstate commerce from burdens and obstructions is not limited to transactions which can be deemed to be an essential part of a 'flow' of interstate or foreign commerce. Burdens and obstructions may be due to injurious action springing from other sources. The fundamental principle is that the power to regulate commerce is the power to enact 'all appropriate legislation' for 'its protection and advancement'; to adopt measures 'to promote its growth and insure its safety': 'to foster, protect, control and restrain.' That power is plenary and may be exerted to protect interstate commerce 'no matter what the source of the dangers which threaten it.' Although activities may be intrastate in character when separately considered, if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that com-

merce from burdens and obstructions, Congress cannot be denied the power to exercise that control." (Citations omitted.)

And as the Court added in *Polish National Alliance* v. *Labor Board*, 322 U.S. 643, 648:

> "Whether or no practices may be deemed by Congress to affect interstate commerce is not to be determined by confining judgment to the quantitative effect of the activities immediately before the Board. Appropriate for judgment is the fact that the immediate situation is representative of many others throughout the country, the total incidence of which if left unchecked may well become far-reaching in its harm to commerce."

The upshot is that:

> "This broad commerce clause does not operate so as to render the nation powerless to defend itself against economic forces that Congress decrees inimical or destructive of the national economy. Rather it is an affimative power commensurate with the national needs. It is unrestricted by contrary state laws or private contracts. And in using this great power, Congress is not bound by technical legal conceptions. Commerce itself is an intensely practical matter. Swift & Co. v. United States, 196 U.S. 375, 398. To deal with it effectively, Congress must be able to act in terms of economic and financial realities. The commerce clause gives it authority so to act." (*North American Co.* v. *Securities & Exchange Commission*, 327 U.S. 686, 705).

Looking to the "economic and financial realities" we find that state and local government purchases have grown to approximately 13% of the gross national product;[3] that the federally financed portion of their budgets has grown

[3] 119 Cong. Rec. S. 14057 (daily ed.), (July 19, 1973).

to roughly 26%;[4] that their workforce has grown to 14% of all employees;[5] that a significant number of these employees have been paid a below poverty level wage and/or required to work overtime;[6] that there has been a secular increase in the number of state and local government work stoppages;[7] and that the society is suffering from inadequate consumer purchasing power and from a failure to adequately distribute available work even in the face of serious unemployment.[8]

If these facts are evaluated from the standpoint that "commerce itself is an intensely practical matter" (*North American Co., supra*) and "that the power to regulate commerce is the power to enact 'all appropriate legislation' for 'its protection and advancement'; to adopt measures 'to promote its growth and insure its safety'; 'to foster, protect, control and restrain' " (*Jones & Laughlin, supra*), then the conclusions that follow are: first, that the payment of less than the minimum wage and the requirement that excess hours be worked at enterprises in commerce are detrimental to the free flow of commerce; second, that substandard working conditions have the same detrimental effect on commerce whether they occur at private or public enter-

[4] Executive Office of the President, Office of Management and Budget, Special Analyses, Budget of the United States Government, p. 205.

[5] U.S. Dept. of Commerce, Bureau of Census, Public Employment in 1973, p. 9.

[6] Background Material on the Fair Labor Standards Act Amendments of 1973, 93d Cong., 1st Sess., p. 220; H. Rep. No. 93-913, 93d Cong., 2d Sess., p. 28.

[7] U.S. Dept. of Labor, Bureau of Labor Statistics, Work Stoppages In Government, Report 434, Table 1.

[8] S. Rep. No. 93-690, 93d Cong., 2d Sess., pp. 9, 12, 24.

prises in commerce; and, third, that Congress has, therefore, been granted authority to alleviate these conditions at all such enterprises.

(c) The appellant State of California recognizes that state and local governments are not "totally immune" from federal regulation under the Commerce Clause and seeks to import into this area from the cases dealing with the taxing power the governmental-proprietary distinction discussed in *New York* v. *United States*, 326 U.S. 572. (Cal Br. 25-26) Assuming, contrary to this Court's decisions (see pp 4-6 *supra*), that this distinction is relevant here there are two reasons why its application does not avail appellants.

First, here, as in *Maryland* v. *Wirtz*, the Act does not touch the States' relationships with those employed as policy makers, executives, professionals or administrators; it reaches only public employees whose duties are essentially the same as their counterparts in private industry. (See 392 U.S. at 193).

Second, here again, as in *Maryland* v. *Wirtz*:

> "The Act establishes only a minimum wage and a maximum limit of hours unless overtime wages are paid, and does not otherwise affect the way in which [state functions] are performed. Thus appellants' characterization of the question in this case as whether Congress may, under the guise of the commerce power, tell the States how to perform their * * * functions is not factually accurate. Congress has "interfered with" these [state] functions only to the extent of providing that when a State employs people in performing such functions it is subject to the same restrictions as a wide range of other employers whose activities affect commerce, * * *." (392 U.S. at 193-194)

The cash nexus between employer and the employees covered by this Act can not by any stretch of the imagination be said to be a "State activit[y] * * * that partakes of uniqueness from the point of view of intergovernmental relations," (*New York* v. *United States*, 326 U.S. at 582).

The only concrete particular in which it has been suggested that federal regulation of the economic relationship between a public employer and its employees differs from regulation of the same relationship in the private sector is that the former may "disrupt the fiscal policy of the States and threaten their autonomy." (*Maryland* v. *Wirtz*, 392 U.S. at 203 (Douglas, J., dissenting).) But, as Mr. Justice Douglas has more recently observed:

> "Where employees in state institutions not conducted for profit have such a relation to interstate commerce that national policy, of which Congress is the keeper, indicates that their status should be raised, Congress can act. And when Congress does act, it may place new or even enormous fiscal burdens on the States." (*Employees* v. *Missouri Public Health Dept.*, 411 U.S. 279, 284.)

The highest of the appellants many extravagant cost estimates for the 1974 amendments is 1 billion dollars. (NLC Br. p. 119.) But there is no doubt that the amount of federal *assistance* to the States is 52 billions. The total picture is hardly one of a federal government intent on economic strangulation of the States. Indeed, while the appellants are long on prophecies of impending financial catastrophies that could be visited on the States by Congress acting pursuant to the commerce power as stated in *Maryland* v. *Wirtz*, the decisive point is that the 1966 FLSA amendments have been in effect for 8 years, the States have had an ample opportunity to demonstrate that those amendments have undermined the administration of those institutions but

have not been able to do so. To the contrary, the best evidence demonstrates that "Overall it can be stated that the education and hospital sectors have had little evident difficulty adjusting to the minimum wages established by the 1966 Amendments." (S. Rep. No. 92-842, 92d Cong., 2d Sess., p. 19.)

The arguments of the appellants presuppose that if the commerce power were to be limited as they propose the States would be autonomous masters of their fiscal fortunes. That supposition would probably have been a romantic illusion even in 1790. It certainly bears no relation to reality today. The principal determinants of the economic situations of the cities and states are the decisions of how the national economy is to be managed, who is to be taxed by the federal government and how much, and the proportion if any of the resulting federal revenues that are to be granted to the cities and states. As those who replaced the Articles of Confederation with the Constitution intended, these decisions are made by Congress, which is their chosen instrument for exercising "the vast expanse of federal authority over the economic life of the new nation" (*Maryland* v. *Wirtz*, 392 U.S. at 196). No matter how much may remain of the intergovernmental tax immunity doctrine (and it should be remembered that *New York* v. *United States*, *supra* affirmed the tax levied) there can be no doubt that as to all other aspects of the economy the taxing power of Congress is paramount. Thus, if the source of the diminition of state control of fiscal affairs inherent in our Constitution must be identified it is the Sixteenth Amendment. And, of course, the courts lack both the authority and capacity to police the federal taxing and fiscal powers on behalf of the States. The aim of returning to the States the complete

control of their fiscal affairs they had possessed in 1786 is a mirage: That is an end obtainable only by destroying the system the States created in adopting the Constitution.

2. (a) The discussion thus far establishes that there is no implicit limitation inherent in the Commerce Clause itself which would bar the application of the FLSA to public enterprises in commerce. It is equally plain that the one explicit provision of the Constitution upon which the appellants rely, the Tenth Amendment, can not be used to justify the result they seek. As a unanimous Court explained in *Sperry* v. *Florida Bar*, 373 U.S. 379, 403:

> "Congress having acted within the scope of the powers 'delegated to the United States by the Constitution,' [there the power to grant patent rights] it has not exceeded the limits of the Tenth Amendment despite the concurrent effects of its legislation upon a matter otherwise within the control of the State. 'Interference with the power of the States was no constitutional criterion of the power of Congress. If the power was not given, Congress could not exercise it; if given, they might exercise it, although it should interfere with the laws, or even the Constitution of the States.' II Annals of Congress 1897 (remarks of Madison). The Tenth Amendment 'states but a truism that all is retained which has not been surrendered.' United States v. Darby, 312 U.S. 100, 124; Case v. Bowles, 327 U.S. 92, 102. Compare Leslie Miller, Inc. v. Arkansas, 352 U.S. 187. The authority of Congress is no less when the state power which it displaces would otherwise have been exercised by the state judiciary rather than by the state legislature."

And *Oklahoma* v. *Civil Service Commission*, 330 U.S. 127, shows that the scope of the Tenth Amendment is no greater when the claim is that there has been an interference with

state personnel policies. There the State challenged a determination by the Civil Service Commisison made pursuant to§ 12(a) of the Hatch Act[8] that an Oklahoma Highway Commissioner had violated that Act's restrictions on political activity and that the violation warranted his removal. The State instituted review proceedings in the federal courts, and those proceedings ended in a determination by this Court upholding the Commission's action and rejecting the State's Tenth Amendment claim:

> "Petitioner's chief reliance for its contention that § 12(a) of the Hatch Act is unconstitutional as applied to Oklahoma in this proceeding is that the so-called penalty provisions invade the sovereignty of a state in such a way as to violate the Tenth Amendment by providing for possible forfeitures of state office or alternative penalties against the state."
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> * * *
>
> While the United States is not concerned and has no power to regulate local political activities as such of state officials, it does have power to fix the terms upon which its money allotments to states shall be disbursed.
>
> "The Tenth Amendment does not forbid the exercise

[8] Section 12(a) provided, in essence, that "no officer * * * of any State * * * agency whose principle employment is in connection with any activity which is financed in whole or in part by loan or grants made by the United States * * * shall * * * take any active part in political management or political campaigns." Section 12 (b) provided that if the Commission after hearing determined that a violation of §12(a) had occurred, it might determine that the violation is such that it "warrants the removal of the officer" and provided further that "if the officer . . . has not been removed from his office * * * within thirty days after notice of [such] determination * * * the Commission * * * shall make * * * an order requiring [the withholding] from its loan or grants . . . [of] an amount equal to two years' compensation at the rate such officer . . . was receiving at the time of such violation."

> of this power in the way that Congress has proceeded in this case. As pointed out in United States v. Darby, 312 U.S. 100, 124, the Tenth Amendment has been consistedly construed as not depriving the national government of authority to resort to all means for the exercise of a granted power which are appropriate and plainly adapted to the permitted end. The end sought by Congress through the Hatch Act is better public service by requiring those who administer funds for national needs to abstain from active political partisanship. So even though the action taken by Congress does have effect upon certain activities within the state, it has never been thought that such effect made the federal act invalid." (330 U.S. at 142-143, footnotes omitted.)

The Court thus sustained a federal regulation directly affecting State employees who perform a wide range of functions, and which, by restricting those employees' political activity, intrudes far more directly on State concerns than does the FLSA.

To be sure, as the National League of Cities brief (at pp. 92-94) stresses, narrowly read, *Oklahoma* upholds only Congress' right to "fix the terms upon which its money allotments to the state[s] shall be disbursed," and we agree that power is even broader than the commerce power. But it does not follow that *Oklahoma*'s discussion of the impact of the Tenth Amendment is not controlling in this context as well. For, the Court cite and follow the construction of the Tenth Amendment articulated in *United States* v. *Darby,* 312 U.S., at 124 and, of course, *Darby* upheld Congress' authority under the Commerce Clause to enact the original FLSA, overruling *Hammer* v. *Dagenhart*, 247 U.S. 251. (Cf. Cal. Br. 31.) Moreover, this Court has been no less uncompromising in its insistence that the Tenth Amendment does not limit federal laws otherwise valid under the Com-

merce Clause because they displace state rules regulating public employees. In *California* v. *Taylor*, 353 U.S. 553, 568, the Court stated:

> "Finally, the State suggests that Congress has no constitutional power to interfere with the 'sovereign right' of a State to control its employment relationships on a state-owned railroad engaged in interstate commerce. In United States v. California (US) supra, this Court said that the State, although acting in its sovereign capacity in operating this Belt Railroad, necessarily so acted 'in subordination to the power to regulate interstate commerce, which has been granted specifically to the national government.' * * * That principle is no less applicable here."

In short, the commerce power like the power "to fix the terms upon which [Congress'] money allotments to the state[s] shall be disbursed," is not limited by the Tenth Amendment.

(b) The cases just cited demonstrate that the concept of federalism set out in the Constitution provides for the resolution of the occasional clash of sovereignties which is inherent in a federal system by subordinating *all* state enactments, which are inconsistent and incompatible with a federal enactment passed by Congress, pursuant to a plenary authority granted to it, to the paramount federal law. This conclusion is the only one which gives proper scope to the Supremacy Clause.

The logic of the appellants' position is that our constitutional system recognizes two forms of state sovereignty, different in kind. The first is that manifested in enactments governing the State's private citizens and state activities which are "proprietary" rather than "governmental." The appellants do not contest the proposition that such

enactments are subject to displacement by superior federal law. So far as we can understand the only manifestation of the second and "higher" form of sovereignty claimed to be beyond otherwise plenary federal authority is enactments regulating the States' relations with their employees who perform "governmental" functions.

This two level theory of the Supremacy Clause is without support in either precedent or reason. The image invoked by the State of California is that in enacting the 1974 amendments "Congress has intruded into the very halls of the legislatures of the sovereign States regulating the mode and method of compensation of their employees." (Cal. Br. p. 21.) That image has a certain rhetorical force because it invokes Mr. Justice Frankfurter's preclusion of federal taxation of the statehouse in *New York* v. *United States*, 326 U.S. at 582, and more significantly because a state legislature in session passing the laws that regulate activities within that jurisdiction is the paradigm of sovereignty in action. As the National League of Cities correctly observes "Governments are bundles of law powers." (NLC Br. p. 56.) But, as Mr. Justice Black explained in *Case* v. *Bowles*, 327 U.S. 92 (where the Court upheld the application of the Emergency Price Control Act, enacted pursuant to the War Power Clause, to sales by the State of Washington of timber grown on state land; the proceeds of said sales to go for the support of the public schools), the precise purpose of the Supremacy Clause is to sanction Congressional "intrusion into the very halls of the [State] legislatures" so long as that intrusion is predicated on a power enumerated in the Constitution, and even though the result is to displace the State's judgment as to how it wishes to order its internal governmental affairs:

"[O]ur only question is whether the state's power to make the sales must be in subordination to the power of Congress to fix maximum prices in order to carry on war. For reasons to which we have already adverted, an absence of federal power to fix maximum prices for state sales or to control rents charged by a state might result in depriving Congress of ability effectively to prevent the evil of inflation at which the Act was aimed. The result would be that the Constitutional grant of the power to make war would be inadequate to accomplish its full purpose. And this result would impair a prime purpose of the federal government's establishment.

"To construe the Constitution as preventing this would be to read it as a self-defeating charter. It has never been so interpreted. Since the decision in M'Culloch v. Maryland, 4 Wheat (US) 316, 420, it has seldom if ever been doubted that Congress has power in order to attain a legitimate end—that is, to accomplish the full purpose of a granted authority—to use all appropriate means plainly adapted to that end, unless inconsistent with other parts of the Constitution. And we have said, that the Tenth Amendment "does not operate as a limitation upon the powers, express or implied, delegated to the National Government.

"Where as here, Congress has enacted legislation authorized by its granted powers, and where at the same time, a state has a conflicting law which but for the Congressional Act would be valid, the Constitution marks the course for courts to follow. Article VI provides that "The Constitution and the Laws of the United States . . . made in Pursuance thereof . . . shall be the supreme Law of the Land. . . ." (327 U.S. at 102; footnotes omitted.)

Since "Governments are bundles of law powers" (NLC Br. p. 56), the use of those powers, and not the actions of

state employees in "operating airports [or] public housing" (NLC Br. p. 51), is the essential expression of the States as "Governments *qua* Governments" (NLC Br. p. 58). Thus, it turns the Supremacy Clause on its head to read the Constitution as sanctioning the overriding of the States' legislative powers to regulate commerce but as not contemplating the supremacy of federal law where the States act not "*qua* Government" but *qua employer*.

3. Throughout the legislative deliberations on the 1974 amendments the coverage of fire fighters was a major concern. Indeed, at the first set of hearings held by the Senate Labor Committee in 1971 on a bill which was ultimately to become the 1974 amendments,[9] testimony was presented regarding the abusive work schedules imposed on fire fighters and their substandard wages in various parts of the country. Brought to Congressional attention was the 96 hour duty week of certain fire fighters in the State of California and the 72 hour duty week of all fire fighters employed by the United States Department of Defense. Congress was also made aware of hourly wage rates for fire fighters ranging as low as $1.22 an hour.[10] It is difficult to imagine a service more directly related to commerce and more essential to the free flow of commerce than fire-fighting. The necessity of uninterrupted fire supression and control services is vividly illustrated by the effects of the fire which cripped a major portion of New York's telephone

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[9] Both Houses of Congress passed FLSA amendments in 1972 but the House of Representatives refused to go to conference with the Senate. In 1973, Congress passed but the President vetoed FLSA amendments.

[10] Hearings on S. 1861 and S. 2259 before the Subcommittee on Labor of the Committee on Labor and Public Welfare, United States Senate, 92nd Cong., 1st Sess., pt. 1 at p. 366.

service for several weeks. And, public, non-federal fire-fighting agencies are responsible for fire control, for example, at the airports in and around New York. Local fire fighting agencies have responsibility for fire control at each United States Post Office, exclusive of those on Federal reservations. With this background, Congress concluded that the minimum wages and maximum hours of governmental fire fighters were subject to regulation under the commerce power and that these needed the protection of the FLSA as much as privately employed fire fighters who have been covered by the law since its inception. See *Armour & Co.* v. *Wantock*, 323 U.S. 126.

(a) The appellants seek to overturn that Congressional judgment of the strength of the claim that the 1974 amendments severely impede, if not prohibit, the practice engaged in by many public-spirited citizens of providing voluntary services to states and local governments. Indeed, the estimated cost impact presented to this Court by appellants is based in large measure on an assumption that approximately 1 million volunteer fire fighters will become subject to the FLSA.[11] Nothing could be further from the truth. As early as 1973, during the legislative debate on what was to become the 1974 amendments, Senator Williams was asked about the coverage of volunteer fire fighters during a colloquy with Senator Roth of Delaware:

> "MR. ROTH. In a number of states, including the state of Delaware, we have a system of volunteer firemen. They get no basic compensation but they do get certain indirect benefits, commonly known as fringe

[11] Appellants often cited cost impact of "billions" of dollars is premised solely on an irrational expectation that 1 million volunteer fire fighters will suddenly become employees at an annual cost of 4.5 billion dollars.

benefits. In the case of Delaware, they have certain insurance coverage. I am not certain about other States, but it is my understanding that this legislation would in no way affect that arrangement. Would the Senator care to comment?

"MR. WILLIAMS. I have had an opportunity to discuss this with the Senator from Delaware. The volunteers are described as true volunteers and, as such, they would not be considered employees and, therefore, not covered under the law or under this bill.

"The committee report did speak to this in an analogous area when we stated that the committee did not intend to extend the Fair Labor Standards Act coverage to those persons to whom tangible benefits are of secondary significance. We are dealing with programs in the Federal establishment where the basic reason for the activity is voluntary, such as the Peace Corps, and so forth.

"Where the purpose is not employment but voluntary service, the incidentals will not necessarily carry these individuals from the volunteer service into employment. It would depend on the facts.

"MR. ROTH. I thank the senator for his comments. In closing I wish to say that the system of volunteer firemen is an outstanding success and I would hate to see anything jeopardize it.

"MR. WILLIAMS. Yes, and I think of fire companies, rescue squads, and others. Many are volunteer services and we are grateful." (119 Cong. Rec. S 14055 (daily ed., July 19, 1973.)

Consistent with the Congressional intent the Labor Department's regulations clearly exempt volunteers from coverage. This exemption is consistent also with 30 years of regulatory experience under which the Department of Labor has

exempted "volunteers" in other instances, e.g. Red Cross volunteers.

(b) Appellants assert further that the Secretary of Labor violated due process of law by failing timely to inform state and local governments of his intention to include sleep and meal periods in the calculation of hours of work of fire fighters. Appellants feigned surprise flies in the face of the legislative history of the 1974 amendments. A brief chronological recital is in order.

In 1973, Congress passed FLSA amendments which would have eventually required overtime pay for fire fighters after forty hours per week or 160 hours in a 4 week period. The exclusion of sleep and meal periods was explicitly authorized in S. Rep. No. 93-300, 93d Cong., 1st Sess., pp. 26-27, which noted the applicability of standard Department of Labor regulations on determining "hours of work." As noted above, this legislation, however, was vetoed.

In 1974, Congress passed the FLSA amendments before the Court. This time, in response to assertions by state and local government representatives that the standard workweek for fire fighters was 56 hours, the legislation required overtime pay after 60 hours in a week (240 hours in a 28-day period) phasing downwards eventually to 54 hours per week (216 hours in a 28-day period). (See § 7(h) of the FLSA as amended.) In the conference report, Congress made clear its intent that the Labor Department's standard hours of work regulations (under which sleep and meal time would have been excluded) would no longer be applicable. (See H. Rep. No. 93-953, 93rd Cong., 2nd. Sess., p. 27.)

Finally, on May 14, 1974, the Department of Labor issued a notice of its intent to interpret "on duty" time for fire fighters and police as inclusive of sleep and meal time for

minimum wage purposes (at that time only the minimum wage provisions of the law were applicable to fire fighters and police). (39 F. R. 17596.) This interpretation is clearly consistent with the intent of Congress and is mandated by legislative history. It is also clear that this interpretation is consistent with established practice in most fire departments,[12] and has been the interpretation applied by appellants in calculating their cost estimates in their Congressional testimony.

Against this background, it is clear that appellants claim of "surprise" is contrived to add to the superheated atmosphere they have sought to create as a substitute for rational analysis.

(c) Appellants' principal assertion of cost impact is made with respect to the Act's overtime requirements. The National League of Cities brief (at p. 11) estimates an additional cost of 200 million for fire protection services. This figure is most certainly an imaginary horrible. For, under Section 7(k) of the Act, as already noted, no overtime compensation is required unless the employees work an average of over 60 hours per week in any 28 day period. And appellants themselves recognize that only 15% of the public fire protection agencies (and about 10% of firefighting personnel) work in excess of 60 hours per week. Appellants' own calculation of the estimated overtime costs for these agencies is 30 million for the first year (II App., p. 628)—which

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[12] Although appellants seek to create new facts before this Court, Chief Michael T. Mitchell, Los Angeles Fire Department, representing both appellant National League of Cities and appellant National Governors' Conference testified at the June 1974 hearings of the Department of Labor that typically, on duty time for fire fighters includes sleep and meal periods. See official report of the proceedings, June 3 and 4, p. 209.

figure is close to the Department of Labor's estimate before Congress of 27 million (29 C.F.R. 533; II App., p. 596). The remainder of Appellants' cost estimate is based on the assumption that local governments will not qualify under § 7(k). There is no valid basis for that assumption. There are no difficulties in qualifying and if the States and cities can organize themselves to bring their views before the Courts they can be counted upon to organize themselves to take the steps necessary to conform to § 7(k).

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted.

J. Albert Woll
General Counsel, AFL-CIO

Robert C. Mayer
Laurence Gold
736 Bowen Building
815 Fifteenth Street, N.W.
Washington, D.C. 20005